Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 91-907

IN THE

Supreme Court of the United States

October Term, 1991

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Petitioners,

against

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Respondent.

(title continued on next page)

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK FOR THE THIRD JUDICIAL DEPARTMENT

Supplemental Appendix to Petition for a Writ of Certiorari

ROBERT ABRAMS
Attorney General of the State of New York,
Attorney for Petitioners Department of Taxation and Finance of the State of New York and James W. Wetzler, Commissioner of Taxation and Finance of the State of New York
The Capitol
Albany, NY 12224
(518) 474-8101

JERRY BOONE*
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

LEW A. MILLENBACH
Assistant Attorney General
Of Counsel

*Counsel of Record

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Petitioners,

against

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Respondent.

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264

(1561A—LC5-185—1991)

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APPENDIX A—Order of Court of Appeals Denying Motion for Leave to Appeal

COURT OF APPEALS

STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of September A.D. 1991

PRESENT,

HON. SOL WACHTLER, Chief Judge, presiding.

3- Mo. No. 858

MILHELM ATTEA & BROS., INC., &C.,

Respondent,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK *et al.*,

Appellants.

ELIAS H. ATTEA, JR.,

Respondent,

v.

JAMES W. WEXLER, &C., *et al.*,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above causes having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Clerk of the Court

APPENDIX B—Order of Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 9th day of October, 1990.

PRESENT:

HON. LEONARD A. WEISS,
Justice Presiding,
HON. ANN T. MIKOLL
HON. HOWARD A. LEVINE
HON. THOMAS E. MERCURE
HON. NORMAN L. HARVEY,
Associate Justices.

MILHELM ATTEA & BROS., INC. a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff-Respondent,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York,

Appellants-Defendants.

(FIRST ACTION)
County Clerk's Index No. 7-89

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff-Respondent,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Appellants-Defendants.

(SECOND ACTION)
County Clerk's Index No. 8-89

Defendants-Appellants, Department of Taxation and Finance of the State of New York, James W. Wetzler, Commissioner of Taxation and Finance of the State of New York, and the Tax Appeals Tribunal of the State of New York, having appealed from an ORDER AND JUDGMENT of the Supreme Court of the State of New York, Albany County, entered on the 22nd day of August, 1989, in the office of the Clerk of the County of Albany, and said appeal having been presented during the above-stated term of this court, and having been argued by Robert Abrams,

Attorney General of the State of New York (Lewis A. Millenbach, Esq. of Counsel) for appellant, and by Kavinoky & Cook (Joseph E. Zdarsky, Esq. of Counsel) for respondent in the First Action, and by Williams, Stevens, McCarville & Frizzell, P.C. (Timothy O'Mara, Esq. of Counsel) for respondent in the Second Action, and, after due deliberation, the court having rendered a decision on the 6th day of December, 1990 (Opinion per Mikoll, J.), it is hereby

ORDERED that the Order and Judgment so appealed from be and the same hereby are affirmed, with costs.

ENTER:

/s/ MICHAEL J. NOVACK
Clerk

DATED AND ENTERED: January 8, 1991
A TRUE COPY
Michael J. Novack
Clerk

APPENDIX C—Order and Judgment of Supreme Court, Albany County.

At a term of the Supreme Court of the State of New York held in and for the County of Albany at the Albany County Courthouse on the 30th day of May, 1989.

SUPREME COURT : COUNTY OF ALBANY

STATE OF NEW YORK

MILHELM ATTEA & BROS., INC., a/k/a MILHELM ATTEA & BROTHERS, INC. a/k/a MILHEM ATTEA & BROTHERS, INC., 1509 Clinton Street, Buffalo, New York 14206,

Plaintiff,

v.

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and JAMES W. WETZLER, Commissioner of Taxation and Finance of the State of New York and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(First Action)
Index No. 7-89
RJI No. 0189017023

Justice Assigned: Hon. Paul E. Cheesman

and

ELIAS H. ATTEA, JR., 6175 Stickler Street, Clarence, New York 14031,

Plaintiff,

v.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, State Campus, Albany, New York 12227,

Defendants.

(Second Action)
Index No. 8-89
RJI No. 0189017022
Justice Assigned: Hon. Paul E. Cheeseman

Order and Judgment Granting Declaratory Judgment and Permanent Injunction

Plaintiffs in each of the above referenced actions, having each made a motion for an Order and Summary Judgment pursuant to CPLR §3212 declaring: (1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto; (2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or pre-empted by federal law; and (3) that the State of New York is

otherwise without power to regulate or interfere with sales of cigarettes made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants, insofar as they purport to provide that such sales are subject to New York State taxes or regulation, are null and void and of no force and effect; and plaintiffs having also moved for summary judgment against the defendants, and each of them, and all of their respective agents, employees and others under their control, permanently enjoining and restraining said defendants and persons: (1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiffs to Indians on Indian reservations within the territorial boundaries of the State of New York; (2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiffs by reason of or in connection with said sales; and (3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants by reason of or in connection with such sales; and the defendants having cross-moved to dismiss each of the actions for the plaintiffs' failure to exhaust their administrative remedies, or, in the alternative, for summary judgment,

NOW, THEREFORE, as to the first action referred to above, upon reading and filing the Notice of Motion for Summary Judgment dated March 31, 1989, the affidavit of Rosemary Saffire, sworn to the 31st day of March, 1989, the affidavit of Joseph E. Zdarsky, sworn to the 27th day of May, 1989, and the respective exhibits annexed thereto, all in support of the motion of the plaintiff in the first action and upon reading and filing the defendants' Notice of Cross-Motion for Summary Judgment dated May 19, 1989,

the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto, all in opposition to the motion of the plaintiff in the first action and in support of the defendants' cross-motion, and upon all the pleadings and proceedings heretofore had in the first action; and, as to the second action referred to above, upon reading and filing the Notice of Motion dated April 24, 1989, the affidavit of Elias H. Attea, Jr., sworn to the 24th day of April, 1989, the affidavit of Timothy M. O'Mara, sworn to the 30th day of May, 1989, and the respective exhibits annexed thereto, all in support of the plaintiff's motion in the second action, and upon reading and filing the defendants' Notice of Cross-Motion dated the 19th day of May, 1989, the affidavit of Jamie Woodward, sworn to the 18th day of May, 1989, the affidavit of William F. Collins, sworn to the 19th day of May, 1989, and the respective exhibits annexed thereto in opposition to the plaintiffs' motion in the second action and in support of the defendants' cross-motion, and upon all pleadings and proceedings heretofore had in the second action, and after hearing Kavinoky & Cook, Joseph E. Zdarsky, Esq., of counsel, attorneys for Milhelm Attea & Bros., Inc., the plaintiff in the first action referred to above in support of the motion of the plaintiff in said action, and in opposition to the defendants' cross-motion; and Williams, Stevens, McCarville & Frizzell, P.C., Timothy M. O'Mara, Esq., of counsel, attorneys for Elias H. Attea, Jr., the plaintiff in the second action referred to above, in support of the motion of the plaintiff in said action and in opposition to the defendants' cross-motion, and the Hon. Robert Abrams, Attorney General of the State of New York, Richard J. Freshour, Esq., Assistant Attorney General, of counsel, attorneys for the defendants in each of the actions in opposition to the said plaintiffs' motion and in support of the defendants' cross-motions; and due deliberation having been had

thereon, and the court having rendered its written decision dated June 5, 1989; it is hereby

ORDERED, that the respective motions of Milhelm Attea & Bros., Inc., the plaintiff in the first action above, and Elias H. Attea, Jr., the plaintiff in the second action above, for summary judgment granting a declaratory judgment and permanent injunctive relief, be and the same hereby are in all respects granted; and it is further

ORDERED that the defendants' cross-motions to dismiss each of the above referenced actions or, in the alternative, for summary judgment, are in all respects denied; and it is further

ORDERED AND ADJUDGED, with respect to the first action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the Tax Law of the State of New York, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Milhelm Attea & Bros., Inc. and/or provide that such sales are subject to New York State taxes or regulation, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Milhelm Attea & Bros., Inc. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but not limited to regulations adopted on August 29, 1988, and

published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4, and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales by plaintiff Milhelm Attea & Bros., Inc. to Indians on Indian reservations within the boundaries of the State of New York; and it is further

ORDERED and ADJUDGED, with respect to the second action,

(1) that the State of New York is without power to impose cigarette taxes with respect to any of the sales heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York by reason of the United States Constitution and the laws of the United States enacted pursuant thereto;

(2) that, insofar as the aforesaid limitations on the taxing power of the State of New York are expressly set forth in the relevant provisions of the law, the aforesaid provisions of the Tax Law of the State of New York do not apply by their express terms to the sale of cigarettes made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York, and insofar as the Tax Law of the State of New York does not expressly so provide and purports to impose such cigarette taxes with respect to such sales, it is unconstitutional and/or preempted by federal law; and

(3) that the State of New York is otherwise without power to regulate or interfere with sales of cigarettes made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New

York, and by reason thereof, regulations adopted by defendants on August 29, 1988, and as published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, insofar as they purport to apply to such sales by plaintiff Elias H. Attea, Jr. and/or provide that such sales are subject to New York State taxes or regulation, are null and void and of no force and effect; and it is further

ORDERED and ADJUDGED, that the defendants, and each of them, and all of their respective agents, employees and others under their control, be and the same hereby are, permanently enjoined and restrained:

(1) from determining, collecting, or attempting to collect cigarette taxes with respect to sales of cigarettes heretofore made or hereafter made by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York;

(2) from commencing or causing to be commenced, or maintaining, under the Tax Law or otherwise, administrative proceedings, civil proceedings or criminal proceedings against or involving the plaintiff Elias H. Attea, Jr. by reason of or in connection with said sales; and

(3) from otherwise enforcing or attempting to enforce any other provisions of the Tax Law of the State of New York or regulations adopted by defendants, including but not limited to regulations adopted on August 29, 1988, and published in Sections 331.6, 331.7, 331.8, 331.9, 331.10 of Part 331 and Sections 335.3, 335.4 and 335.5 of Part 335 of Chapter III, Subchapter C of Title 20 of the Official Compilation of Codes, Rules and Regulations of the State of New York, by reason of or in connection with such sales

by plaintiff Elias H. Attea, Jr. to Indians on Indian reservations within the territorial boundaries of the State of New York.

Dated: Albany, New York
Aug. 2, 1989

Hon. Paul E. Cheeseman,
Justice of the Supreme Court

ENTER:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY CLERK'S OFFICE)

I, THOMAS G. CLINGAN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Order with the original thereof filed in this office on the 22nd day of Aug., 1989 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal this 22nd day of Aug., 1989.

Thomas G. Clingan, Clerk

Office of Albany County Clerk
Albany, N.Y.
Aug 22 2 58 PM '89